

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

APPEAL NO.609 OF 2001

IN

ARBITRATION PETITION NO.221 OF 1998

...

Municipal Corporation of

Brihan Mumbai

...Appellants

v/s.

Jayantilal D.Shah & anr.

...Respondents

...

Mr.R.D.Dhanuka with Mr.K.N.Gaikwad for the
Appellant.

Mr.Rajiv Kumar with Mr.S.N.Shah and Mr.N.Ramchandra
i/b Narayana & Narayana for the Respondent No.1.

...

CORAM: D.K.DESHMUKH &

J.H.BHATIA, JJ.

DATED: 18TH OCTOBER, 2007

P.C. :

1. By this Appeal, the Appellant challenges the orders passed by the learned single Judge of this Court in Arbitration Petition No.221 of 1999 dated 27th March, 2001 and 4th April, 2001. By that arbitration petition, the Appellant had raised an objection under Section 30 of the Arbitration Act, 1940 to the award dated 24-6-1997 passed by the learned arbitrator. Reference to the arbitrator was made because the Respondent No.1, who is the contractor of the Appellant-corporation had filed a suit under Section 20 of the Arbitration Act, which was registered as Arbitration Suit No.1664 of 1984. That suit was disposed of by this court by order dated 14th March, 1990. The suit was granted in terms of prayer clause (a) of that suit. It was also granted in terms of prayer clause (b) and the court also directed the parties to appoint an arbitrator.

2. Pursuant to that order, arbitrator was appointed. The arbitrator made a non-speaking award directing the Corporation to pay Rs.60,91,025.96 with interest.

3. An objection was raised to this award under Section 30 of the Act. One of the principal objections raised to the award was that while referring the matter to arbitration this court had indicated that on behalf of the Corporation an objection to the arbitrability including the claims not being the within the period of limitation was raised. The learned single Judge had observed that he is not deciding the issue of arbitrability of the claim, he is not also not deciding the issue whether the claims have been made within the period of limitation and that those issues will have to be decided by the learned arbitrator while making the award. It was submitted that in the written statement filed before the learned arbitrator, a question of arbitrability of the claims as also that the claims are beyond the period of limitation was raised, but the learned arbitrator did not decide those claims. The award of the arbitrator also does not indicate that he has applied his mind to the aspect of objection as to the arbitrability of the claims and the claims being beyond the period of limitation. The learned single Judge rejected the objections by holding that because it is a

non-speaking award and when the arbitrator has decided the claims on merits, it implies that he has rejected the objections by implication.

4. The learned Counsel appearing for the Appellant submits that when objection as to the arbitrability of the claims is raised before the arbitrator and even if the arbitrator decides the claims by non-speaking award, the award must on the face of it indicate that the learned arbitrator has applied his mind to the objections raised. The learned Counsel relies on the two judgments of the Supreme Court, one in the case of Tamil Nadu Electricity Board v/s. M/s.Bridge Tunnel Constructions and ors, AIR 1997 SC 1376, and other in the case of M/s.Premier Fabricators v/s. M/s.Heavy Engineering Corporation Ltd., AIR 1997 SC 3603 and submits that as the award on the face of it does not show that the learned arbitrator has applied his mind to the objections raised as to the arbitrability of the claims, the award is liable to be set aside.

5. On the other hand, the learned Counsel appearing for the Respondents submits that the learned single Judge was justified in holding that when the learned

arbitrator decided the claims on merits, it implies that the objections as to arbitrability were rejected and therefore it is for the Appellant to show that there is any error apparent on the face of the award. He relies on a judgment of the Supreme Court in the case of N. Chellappan v/s. Secretary, Kerala State Electricity Board and anr, AIR 1975 SC 230.

6. Now, perusal of the order of this Court passed in Arbitration Suit No.1664 of 1984 clearly shows that issue about non-arbitrability of the claims was raised before the learned single Judge, who decided that suit and the learned Judge observed that it is not for him to decide whether the claims that are to be made before the arbitrator are arbitrable or within the period of limitation or not. The learned Judge has held that for the purpose of deciding the suit only objection he has to decide is whether the suit has been filed within the period of limitation. The learned single Judge held an inquiry into that aspect of the matter and has found that the suit has been filed within the period of limitation. Therefore, the learned Judge granted the suit in terms of prayer clauses of the suit. Perusal of the written statement filed by the Corporation before the

learned arbitrator shows that the question about arbitrability of the certain claims including that certain claims are barred by the law of limitation was elaborately raised before the learned arbitrator. Perusal of the award shows that it is a non-speaking award and in the award the learned arbitrator has not even indicated that before him any objection as to the arbitrability of the claims or the claims not being within the period of limitation was raised. The award on the face of it does not show that the learned arbitrator had applied his mind to the issue of arbitrability of the claims including that the claims were within the period of limitation. We find that in its judgment in the case of M/s.Premier Fabricators, referred to above, the Supreme Court was considering similar situation and in our opinion, the observations made in paragraph 29 of the judgment are relevant. They read as under:-

29. In view of the admitted position that the umpire in the present case has not considered the arbitrability of items 2 to 5 of the claims in the non-speaking award, it cannot be construed that by implication he had considered the arbitrability of the claims.

The preliminary question raised by the parties was as to the arbitrability of items 2 to 5 of the claims and whether they are within the scope of the contract. Before proceeding to adjudicate the claims 2 to 5 on merits, the umpire was required to give his finding on the issue of arbitrability of claims 2 to 5 and reasons in support thereof. The third learned Judge (L.M.Sharma J. as he then was) and Sinha, J. have rightly held that the umpire cannot conclusively decide for himself in a non-speaking award of the arbitrability of the claims and that, therefore, the umpire was required to decide as a preliminary issue of the arbitrability of the claims 2 to 5. We agree with the learned Judges on the finding that the award is illegal.

The Supreme Court has in terms held that when the non-speaking award does not on its face show that the arbitrator has applied his mind to the question of arbitrability of the claims, it cannot be construed that by implication he considered the arbitrability of the claim.

7. So far as the judgment of the Supreme Court in the case of Tamil Nadu Electricity Board is concerned, the observations of the Supreme Court found in paragraphs 26 & 28, in our opinion, are relevant. They read as under:-

26. It would thus be clear that the arbitrator cannot clothe himself conclusively with the jurisdiction to decide or omit to decide the arbitrability of a particular item or the claim made by the parties. When a specific reference has been made to the arbitrator and the parties raise the dispute of arbitrability, with the leave of the Court/by a direction of the Court in a proceeding under Section 33, he is to decide the arbitrability of the dispute and make a decision while giving reasons in support thereof. The decision of the arbitrator in granting a particular sum by a non-speaking award, therefore, hinges upon the arbitrability of a dispute arising under the contract or upon a particular item claimed thereunder. He is required to give the decision thereon. The question of decision by

implication does not arise since his jurisdiction to decide the dispute on merits hinges upon his jurisdiction to decide the arbitrability of the dispute. In this case, in view of the finding recorded by the Court, which has become final, as referred to earlier, the arbitrator/Umpire was enjoined to decide the arbitrability of the claims set up by the respondent and disputed by the appellant. Admittedly, the award of the Umpire does not contain any decision on arbitrability of the claims.

28. It could be seen that if the arbitrator has indicated his mind in the award that he in fact adverted to the arbitrability or non-arbitrability of the claim and then made the award, it would be indicative of the fact that he had, in fact, applied his mind, considered that question and reached the decision in awarding certain amounts by a non-speaking award including the claim in respect of which arbitrability was in issue.

Perusal of the above quoted observations makes it

clear that even in non-speaking award there must be material to show that the arbitrator has applied his mind to the aspect of arbitrability or non-arbitrability of the case, which is raised before him. If it is not done, then the award becomes infirm.

8. So far as the judgment of the Supreme Court in the case of N.Chellappan relied on by the learned Counsel appearing for the Respondent is concerned, perusal of that judgment does not show that the Supreme Court has in terms held that where the claims are decided on merits though the objection to the arbitrability of the claim is raised, the question is deemed to have been decided by implication. In our opinion, however, considering that the judgments of the Supreme Court in the case of Tamil Nadu Electricity Board and M/s.Premier Fabricators, are the later judgments and they decided precisely the question that falls for our consideration, we have to go by the law laid down by the Supreme Court in these two judgments.

9. We, therefore, find that there was infirmity in the award and therefore, the learned single Judge was

not justified in rejecting the objection raised by the Corporation. Now, the question arises as to what is the course of action that we follow? Perusal of the judgment in the case of M/s.Premier Fabricators shows that in that case the award was remitted back. Perusal of the provisions of Section 16 of the Arbitration Act, 1940 shows that if the court finds that the arbitrator has left undetermined any of the matters referred to arbitration, then the court can remit the award back. Section 16 of the Act reads as under:-

16. Power to remit award.- (1) The Court may from time to time remit the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit,-

(a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred; or

(b) where the award is so indefinite as to be incapable of execution; or

(c) where an objection to the legality of the award is apparent upon the face of it.

(2) Where an award is remitted under sub-section (1) the Court shall fix the time within which the arbitrator or umpire shall submit his decision to the Court;

(3) An award remitted under sub-section (1) shall become void on the failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed.

10. In our opinion, as we find that the questions of arbitrability of the claims including that the claims are barred by the law of limitation were raised and they have not been decided by the arbitrator, the proper course to be followed would be to remit the award back to the learned arbitrator.

11. In the result, therefore, the Appeal succeeds

and is allowed. The order of the learned single Judge impugned in the Appeal is set aside.

The award of the arbitrator dated 24-6-1997 in relation to which the Arbitration Petition No.221 of 1998 was filed being Award No.169 of 1997 is remitted back to the learned arbitrator.

The arbitrator will consider the issue in accordance with law. We fix six months time for the arbitrator to make a fresh award.

We have been informed that the amount pursuant to the award has been deposited by the Corporation in this court. Disposal of that amount shall be governed by the orders that may be made by the learned arbitrator. Both the parties shall be free to move the arbitrator for appropriate orders.

Appeal disposed of.

(D.K.DESHMUKH, J.)

(J.H.BHATIA, J.)